

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)

v.)

JOSEPH D. MITCHELL, SR.,)

Defendant)

Criminal No. 91-9-B
(Civil No. 95-264-B-H)

**RECOMMENDED DECISION ON DEFENDANT'S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Joseph D. Mitchell, Sr. moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Mitchell pleaded guilty to five counts of unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) and 924(e), and received the statutory minimum sentence of 180 months imprisonment based on his three prior convictions for violent felonies. He claims that prosecution in federal rather than state court violated his right to due process, that he was entitled to a downward departure, and that he was denied effective assistance of counsel.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (citation omitted). Because I find Mitchell’s allegations insufficient to justify relief if accepted as true, I conclude that no such hearing is necessary and recommend that his motion be dismissed.

I. Background

On October 2, 1980 Mitchell was sentenced in the Maine Superior Court (Washington County) to concurrent four-year prison sentences on charges of rape, burglary, theft and possession of a firearm by a felon. Petitioner's Affidavit in Support of Motion Pursuant to Title 28 U.S.C. § 2255 ("Mitchell Aff.") (Docket No. 11) ¶ 3. Before being released from the Maine State Prison on April 15, 1983, Mitchell was required to read and sign a document that set forth the penalties then in effect under federal law for possession of a firearm by a convicted felon. *Id.* ¶ 4. The document provides in relevant part:

Sec. 1202 (a) Any person who--

(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony . . .

and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

. . .

I, Joseph Mitchell MSP #16015 hereby acknowledge the information directed to me concerning the above Federal Firearms Act, and understand the laws as presented.

Exh. 1 to Mitchell Aff. ("Acknowledgment"). In 1986 Congress amended 18 U.S.C. § 924 to provide that a felon in possession of a firearm who has three prior convictions for violent or drug offenses "shall be fined not more than \$25,000 and imprisoned not less than fifteen years." Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(4), 1986 U.S.C.C.A.N. (100 Stat.) 449, 458; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402(a), 1986 U.S.C.C.A.N. (100 Stat.) 3207, 3207-39 (both codified at 18 U.S.C. § 924(e)(1)).

On February 26, 1991 Mitchell was indicted in this court on five counts of possession of a

firearm by a convicted felon during the period from January/February 1989 to February 15, 1990. Indictment (Docket No. 1). Seven prior convictions under Maine law, for offenses including felonious assault, high and aggravated assault and rape, served as predicate felonies for the federal felon-in-possession charges. *Id.*

At his change-of-plea hearing Mitchell said he understood that the minimum prison sentence for the charged offenses was fifteen years and pleaded guilty to all five counts. Transcript of Proceedings, Hearing on Change of Plea, *United States v. Mitchell*, CR-91-9-B (Docket No. 15) at 6, 9. The sentencing court noted that the applicable Sentencing Guideline range for the offenses would be 21 to 27 months, but necessarily imposed the statutory minimum sentence of 180 months. Transcript of Sentencing Proceedings, *United States v. Mitchell*, CR-91-9-B (Docket No. 16) at 13-14. The court advised Mitchell of his right to appeal the sentence, *id.* at 17, but Mitchell did not appeal, Motion Under 28 USC § 2255 (Docket No. 10) ¶ 8.

II. Prosecution in Federal Court

Mitchell argues that he had a constitutional right to be tried in state court, where he claims the Acknowledgment he signed would have mandated a maximum prison sentence of two years.¹ Although he concedes that prosecutors generally have discretion to decide whether or not to seek an indictment, Mitchell argues that the federal prosecutor's discretion "infringed upon his constitutional right[] to be tried in state jurisdiction, where there was never any permissible reason established as

¹ Mitchell repeatedly refers to the Acknowledgment as a "stipulation" or "agreement." The Acknowledgment merely evidences Mitchell's understanding of the penalties then in effect under federal law for possession of a firearm by a convicted felon, and does not purport to bind the state of Maine. Even if it could be construed as a stipulation or agreement, it would not be binding upon federal authorities because they were not parties to the Acknowledgment.

to why his case was brought into Federal Court other than being arbitrary.” Petitioner’s Memorandum in Support of Motion Pursuant to Title 28 U.S.C. § 2255 (“Section 2255 Memo.”) (Docket No. 10) at 5.

I find no authority for Mitchell’s asserted right to be tried in state court. On the contrary, under the dual-sovereignty doctrine both the United States and the state of Maine could have prosecuted Mitchell as a felon in possession of a firearm without violating the Double Jeopardy Clause. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985). Mitchell’s asserted right to be tried in state court is inconsistent with the rationale behind the dual-sovereignty doctrine, i.e., when the same conduct violates the laws of two different sovereigns, the defendant is punishable for both violations. *See id.* at 88.

Mitchell also argues that the decision to prosecute him in federal court was arbitrary, and thus violated his due process rights. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (“[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.”) (citations and internal quotation marks omitted). “[A]bsent proof of discrimination based on suspect characteristics such as race, religion, gender or personal beliefs,” a court may not review a prosecutor’s charging decision even if it was motivated primarily by a desire to impose a harsher sentence. *United States v. Oakes*, 11 F.3d 897, 899 (9th Cir. 1993), *cert. denied*, 128 L.Ed.2d 213 (1994); *see United States v. Jacobs*, 4 F.3d 603, 604 (8th Cir. 1993) (prosecutor may consider penalties available upon conviction so long as he or she does not base decision on impermissible factors such as race, religion, vindictiveness or retaliation for the defendant’s exercise of legal rights); *see also United States v. Batchelder*, 442 U.S. 114, 125 (1979) (mere fact that

prosecutor is influenced by available penalties in deciding under which federal statute to proceed does not give rise to equal protection violation). Mitchell does not argue that he was prosecuted in federal court because of any suspect characteristic. Thus, the decision to prosecute Mitchell in federal court cannot be said to have violated his right to due process.

III. Downward Departure

Mitchell next argues that he was entitled to a downward departure due to several mitigating factors not adequately taken into consideration by the United States Sentencing Commission. Specifically, he claims that he possessed firearms on an Indian reservation where hunting is customary; that he committed no new offenses since his 1983 discharge from state imprisonment; and that he thought he would only be subject to a two-year penalty for possession of a firearm. “A nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances.” *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Although advised of his right to appeal his sentence, Mitchell did not do so. Because he cites no exceptional circumstances excusing this failure, Mitchell is barred from challenging the calculation of his sentence.

IV. Ineffective Assistance of Counsel

To prevail on his ineffective-assistance-of-counsel claim, Mitchell must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show that counsel's performance was constitutionally deficient, i.e., that it fell below an objective standard of reasonableness. *Matthews v. Rakiey*, 54 F.3d 908, 916 (1st Cir. 1995) (citing *Strickland*, 466 U.S. at 687-88). In doing so, he "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Mitchell must also prove that counsel's deficient performance likely prejudiced his defense. *Strickland*, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Mitchell argues that his attorney's "failure to investigate and mitigate before the Court the petitioner's jurisdictional interest, relevant to the signed agreement with the State of Maine" constituted ineffective assistance of counsel. Section 2255 Memo. at 11. As discussed above, the Acknowledgment was not binding on federal authorities, and Mitchell had no constitutional right to be prosecuted in state court. Accordingly, his counsel's conduct was neither constitutionally deficient nor prejudicial to Mitchell.

V. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be ***DENIED*** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 30th day of May, 1996.

*David M. Cohen
United States Magistrate Judge*